

**Testimony of Congressman Ernest J. Istook, Jr.  
House Resources Committee  
October 12, 1999**

**“We reject the proposition [that] the principles of federal Indian law, whether stated in terms of pre-emption, tribal self government, or otherwise, authorize Indian tribes . . . to market an exemption from state taxation to persons who would normally do their business elsewhere.”**

United States Supreme Court  
*Department of Taxation and Finance of New York v. Attea*  
June 13, 1994

Good morning, Chairman Young, Congressman Miller, Members of the Committee. It is my great pleasure to appear before the House Resources Committee this morning to discuss one of the jurisdictional problems which exist between local, State, and Tribal governments. It is a problem which not only harms our roads, schools, public health and safety, but which also threatens our constitutional guarantee of equal protection under the law.

For the past four years, Congressman Peter Visclosky and I have worked to ensure that the tax systems of State and local governments are protected from unscrupulous businesses that refuse to collect the proper sales and excise taxes that are due. We also have wanted to encourage fair competition between Indian and non-Indian businesses. We have not sought to limit the tribal governments that have tax agreements with their neighbors, but instead to address the tribes and individual Indians which operate businesses without regard for the communities in which they live.

This is not a matter of sovereign immunity nor of treaty rights. The U.S. Supreme Court has ruled

repeatedly that those are phony claims on this issue of tax evasion. We have based our efforts on enforcing the rulings of the Supreme Court, which has evaluated the treaties signed by the Federal government and Indian tribes. After reviewing all treaties and all laws passed by Congress, the Supreme Court has ruled that Indian tribal members are exempt from State and local sales and excise taxes when they buy through their tribe, but that non-Indians purchasing items on Indian trust lands are not exempt from those taxes. Even though the Supreme Court has ruled that **states have the right to assess taxes on sales to non-Indians**<sup>1</sup>, the right has been

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<sup>1</sup> These excerpts are from decisions of the United States Supreme Court:

**"It can no longer be argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the tribes "**

**"The State may some times impose a nondiscriminatory tax on non-Indians customers doing business on the reservation."**

*(State of Washington v. Colville, June 10, 1980)*

**"Enrolled tribal members purchasing cigarettes on Indian reservations are exempt from New York cigarette tax, but non-Indians making such purchases are not."**

**"On-reservation cigarette sales to persons other than reservation Indians, however, are legitimately subject to state taxation."**

**"Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked."**

**"We reject the proposition [that] the 'principles of federal Indian law, whether stated in terms of pre-emption, tribal self government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.'"**

**"In particular, these cases [cites precedents] have decided that States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non Indians."**

*(Department of Taxation and Finance of New York v. Attea, June 13, 1994)*

**"We conclude that under the doctrine of tribal sovereign immunity, the state may not tax such sales to Indians, but remains free to collect taxes on sales to non tribal members."**

**"Congress has always been at liberty to dispense with such tribal immunity or to limit it."**

*(Oklahoma Tax Commission v. Potawatomi, Feb. 26, 1991)*

**"But if the legal incidence of the tax rests on the non-Indian, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose the tax."**

*(Oklahoma Tax Commission v. Chickasaw, June 14, 1995)*

meaningless when tribal businesses could avoid collecting the taxes on non-tribal sales, which all other businesses must. **As the Supreme Court decisions make clear, only sales to members of the tribe can be exempted from such local and state taxes.** Unfortunately, some tribes have exploited this exemption falsely claiming it extends to all sales. By leading non-tribal purchasers to believe they do not owe the sales, fuel or excise taxes on these transactions and failing to charge and collect those taxes tribes have sought a wrongful advantage over other businesses. They are profiteering from tax evasion and that is wrong.

Any business can reduce its prices dramatically if they simply ignore the laws on how they and competitors must operate. It is wrong to let law-breaker profit, while those who follow the law are driven out of business because they cannot compete against law-breakers. Omitting taxes from the price enables anyone to undercut competitors dramatically. The steep discount price is a powerful lure attracting customers from nearby non-tribal businesses (and even from great distances). Thus, the tribes can sell gasoline without charging the typical \$.20-.30 per gallon state fuel tax or the \$.40-.60 per pack cigarette tax. They even flaunt this by advertising to the general public that they don't collect taxes. I attach copies of advertising I downloaded from the internet showing this type of advertising. The first problem is that **this drives legitimate, tax-paying competition out of business for miles around.** The second problem is that **it destroys the tax base** that states and cities use to finance roads, schools, parks, housing, public health and safety etc.

The problem is rapidly getting worse.<sup>2</sup> Currently, the State of **New York** estimates tax losses **at \$65**

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<sup>2</sup> The threat is greater to the tax bases than to businesses, because some businesses are protecting themselves by making agreements with the tribes. They enter into a partnership so an existing business becomes tribal property, gaining the trust status and tax advantages, with the extra profits then split. It works under the "If you can't beat 'em, join 'em" theory. It is attractive for many businesses. For example, one business with 40 gasoline stations in Oklahoma was offered a deal with a tribe, which showed it how this special arrangement could try to evade dozens of different taxes and regulations, saving the business over \$3-million per year. But whenever a business does so, it increases and accelerates the problem of unfair

**million for untaxed cigarettes and \$35 million for untaxed motor fuels, Washington State is losing \$63 million per year on untaxed cigarettes, Oklahoma is losing \$27 million per year in cigarette taxes, California is losing between \$30-\$50 million per year in cigarette taxes, Michigan is losing \$75 million in cigarette taxes, Kansas is losing \$3 million per year in cigarette and motor fuel taxes, New Mexico is losing \$4.5 million in motor fuel taxes, and Wisconsin is losing \$6 million in sales taxes. These losses are to the state treasuries only; they do not include revenue lost to local governments. The total national loss likely surpasses \$1 billion annually.**

Some have made the argument that many of the tribes have existing agreements in place so there is no reason for legislation. Often opponents cite the figure of 200 tribes in 18 States as having tax compacts. This is a deceiving argument. This figure comes from a 1995 the Arizona Legislative Council study of State-Tribal tax compacts. What these people are not telling you is that the 200 figure counts many tribes 2, 3, 4, or even 5 times so that the total possible is 960, which is ridiculous because there are fewer than 270 tribes in the lower 48 States. What this study DOES reveal is that only 20.8% of the Tribes have compacts on cigarettes, motor fuels, liquor, sales/use, or other tax categories. I attach for the record a summary from the Arizona Legislative Council study. To those States and tribes who have acted responsibly, I congratulate you, but the overriding fact is that relatively few tribes - only one in five - actually have tax compacts with the States.

Another argument that some have made is that tribes must engage in this tax evasion to make up for cuts in federal Indian programs. These arguments are entirely baseless. The facts are that in FY97 the federal government spent over \$6.98 billion on Indian programs, in FY98 \$7.2 billion, and in FY99 \$7.7 billion. The

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competition, and further diminishes the tax base. There is no corresponding "escape" available for state or local governments.

amount estimated to be spent on Indian programs in FY00 is over \$8.2 billion for Indian programs. This is a 16% increase in just three years.

Some have made the argument in my own state that Oklahoma no longer has a problem with tribal compacts. Let me address that, as an example of the problems across the country.

While it is true that Oklahoma has compacts with some tribes on cigarette and motor fuel, a court ruling has thrown the constitutionality of the Oklahoma gas tax compact into question. This ruling is under appeal. Additionally, in August of last year, the federal Bureau of Alcohol, Tobacco, and Firearms (BATF), in conjunction with the Oklahoma Tax Commission, the Oklahoma Highway Patrol, and local law enforcement officials raided several smoke shops in Oklahoma. This capped a two-year investigation into the evasion of state excise tax laws by tribal smokeshops. This investigation is somewhat of a case study of the problems encountered by states when trying to enforce sales and excise tax laws. Oklahoma enacted its cigarette tax compact in an attempt to collect these taxes in 1992. The investigation followed the Supreme Court ruling of Oklahoma Tax Commission V. Potawatomi. In that case, in 1991, the court ruled that "under the doctrine of tribal sovereign immunity, the state may not tax such sales to Indians, but remains free to collect taxes on sales to non-tribal members"

However, it was 1997 before more than half of the federally recognized Indian tribes in Oklahoma had joined the compact, and even today not all tribe in Oklahoma are members of the compact. Complicating the enforcement of the compact is that often the operator of a smokeshop is the Indian tribe itself, or that the tribe has a direct financial interest in the success of the business, which may even be located on tribal trust land. In cases where the tribe is directly profiting from the evasion of taxes, what incentive is there to enter into a tax

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compact which will reduce their profit?

Such was the case with one of the six smokeshops raided by the BATF in August of last year. The smokeshop was located on land held in trust for the Ponca Tribe. It should be noted that 3 months after the BATF raid the tribe entered into the state tax compact. And this is the key to understanding this problem: The state could not enforce its own tax laws by itself and required federal intervention. However, if the state had possessed the authority to enforce its own tax laws intervention would have occurred much sooner. The BATF has estimated that Oklahoma is losing \$27 million per year due to this tax evasion.

This problem is occurring across America, with many different tribes. Worsening this situation is that even the tribes which have acted responsibly and have enacted tribal taxes, or have entered into tax compacts with the State, cannot always enforce the collection of those taxes on trust land held for an individual Indian. I cite an example from upstate New York where the tribe, after years of effort to collect the tribal tax from a business owned by an individual Indian, eventually bulldozed four smokeshops for failure to collect the tribal tax.

The problem is accelerating as tribes acquire retail business property in areas previously not associated with the tribes. This creates a patchwork quilt of businesses where customers can avoid paying the routine taxes which all other businesses must charge and collect. They can establish these tribal businesses anywhere. It can be on land that has never had any connection with the tribe, or is miles away from where the tribe has other land, or is even in another state. This not only creates grossly unfair competition, but it robs states and communities of the revenues which are necessary to fund our schools, our roads, public safety, public health and other key services provided by state and local government. By ownership, lease or operating agreements, the tribes are using the property to operate truck stops, gasoline stations, convenience stores and retail outlets **without**

**charging state or local fuel, sales, or excise taxes.**

*Once land is transferred by the federal government into trust, this problem is not reversible.* The law permits the BIA to transfer land into trust at any location. It need not be adjacent to any tribal lands, nor be part of any former or claimed tribal property, nor even be in the same area or state where the tribe may be. The quantity of land and the location are unrelated to the population of the tribe, or to its economic circumstance.<sup>3</sup>

As the U.S. Supreme Court has stated, the problem does not involve Indian tribes' claims of "sovereign immunity", nor our treaty obligations with Indian tribes. (See Footnote 2.) As Supreme Court decisions have made clear, it is Congress which has created this problem. Therefore, it is Congress that must correct it.

My Colleagues and I have tried several different approaches in an attempt to solve this problem. In 1997 Congressman Visclosky and I introduced HR 1168. It would have required that before the BIA could transfer land into trust status for the benefit of an individual Indian or Indian Tribe, a tax agreement regarding retail sales and excise taxes must be in place with the state in which the land is located.

HR 1168 was supported by a broad coalition of business and governmental groups. However, HR 1168 was opposed by some because they felt that it would have given states a veto on the introduction of new land into trust. Also, some felt that it treated all tribes as though they were "bad actors" and did not differentiate between tribes which were abiding by state-tribal tax compacts and tribes which were evading taxes.

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<sup>3</sup> The U.S. Eighth Circuit Court of Appeals has ruled the current federal law is so loose that, "By its literal terms, the statute permits the Secretary [of Interior, who oversees the BIA] to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls. Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present. There are no perceptible "boundaries," no "intelligible principles," within the four corners of the statutory language that constrain this delegated authority except that the acquisition must be "for Indians." (*State of South Dakota v. U.S. Department of the Interior*, 69 F.2d 878, 1995.) The Eighth Circuit declared the underlying act of Congress unconstitutional; unfortunately the U.S. Supreme Court did not address the issue, but remanded the case to consider other factors.

In response to these concerns, in May of this year Congressmen Visclosky, Sandlin, LaHood, and I, with 19 other colleagues introduced HR 1814. HR 1814 is a markedly different approach than HR 1168 because it does not affect the transfer of land into trust, or the tax agreement between states and tribes. HR 1814 would create a process instead to remove land from trust if a business located on Indian trust land **“consistently and willfully”** failed to pay the lawfully required sales and excise taxes. Thus, it has consequences only for tribes that flaunt the law, and has no impact on those tribes which abide by the law. Removing the trust status for tax evaders would allow the state to enforce its tax laws on that property. This bill was carefully drafted to protect law-abiding tribal establishments and others doing business on tribal land.

While we have focused primarily on creating situations where states would be able to enforce their own tax laws there may be other ways which could be explored which would result in the payment of state taxes. I appreciate all efforts to find a reasonable solution. In evaluating what would be an acceptable solution to the problem one must determine what are the principals that would govern its acceptance. Here are the principles that should be honored within any acceptable solution:

**1. The states must be able to protect their tax streams.**

States should be able to ensure that the proper taxes are being paid by tribal businesses, the same as any other businesses, in a non-discriminatory manner. Equal protection of the laws is the proper standard, as the Constitution requires. This should include the disclosure and enforcement tools that are necessary to ensure and verify compliance.

**2. The status of tribes must be respected.**

Tribes are (and should be) able to start business enterprises and any solution

should not inhibit this ability.

**3. Competition must be fair and equitable.**

Gas and cigarettes are very price-sensitive products. If one business is able to significantly undercut their competitors by not paying the required taxes, they will drive competitors out of business over a wide area. Price is what drives this issue.

Mr. Chairman, Mr. Ranking Member, other Members of the Committee I thank you for allowing me to testify on this important issue and look forward to working together to find an acceptable solution to this pressing national problem.